

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of NICHOLAS LEE BARNES,
Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

NICHOLAS LEE BARNES,

Respondent-Appellant.

UNPUBLISHED

August 28, 2007

No. 269384

Kalamazoo Circuit Court

Family Division

LC No. 05-000273-DL

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Respondent appeals as of right from a trial court order denying his motion to withdraw his plea of admission. We reverse and remand for an evidentiary hearing on respondent's claim of ineffective assistance of counsel. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After a plea of admission has been accepted, the plea may be withdrawn at the court's discretion. MCR 3.941(D). A motion to withdraw a plea is reviewed for an abuse of discretion resulting in a miscarriage of justice. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999).

Respondent has not claimed or shown any procedural error in the taking of the plea. In the absence of a procedural error in receiving the plea, a defendant must establish a fair and just reason for withdrawal of the plea. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997); *People v Jackson*, 203 Mich App 607, 611; 513 NW2d 206 (1994). A guilty plea may be rendered involuntary due to ineffective assistance of counsel where defense counsel fails to explain the nature of the charges or discuss possible defenses thereto. *Id.* at 614.

Respondent presented evidence to the effect that his attorney told him and his mother that respondent had to take the plea offer because there was no defense to be pursued at trial, which suggests that counsel failed to consider and discuss possible defenses to the charges if respondent did opt to go to trial. The court did not address this aspect of the motion. Because there was some record evidence that counsel failed to discuss possible defenses to the charges when presenting respondent with the plea offer and counsel's testimony is essential to proving the

claim of ineffective assistance, *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999), an evidentiary hearing regarding the claim is necessary. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Reversed and remanded for a *Ginther* hearing. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ E. Thomas Fitzgerald